STATE OF MICHIGAN
COURT OF APPEALS

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September 22, 2003

Mr. Scott S. Brinkmeyer
President, State Bar of Michigan
c/o Mika Meyers Beckett & Jones, PLC
900 Monroe Avenue, NW
Grand Rapids, Michigan 49503-1423

RE: Delay Reduction Court Rules

Dear Mr. Brinkmeyer

I am writing in response to your letter to me of August 28, 2003, a copy of which was also sent to the Justices of the Michigan Supreme Court. I appreciate both the time and thought that you and other members of the State Bar of Michigan have devoted to considering the changes in the Michigan court rules that we have proposed, and your personal commitment and courtesy throughout that process.

Your letter asks this Court to join the State Bar of Michigan in requesting the Supreme Court to table consideration of the proposed amendments to MCR 7.212 until the Record Production Work Group has issued its findings and recommendations. We cannot join the State Bar in that request. Indeed, I greatly regret that the State Bar cannot support us in our pursuit of the final element of our long-term plan to eliminate the culture of delay on appeal in Michigan. Delaying the adoption of the proposed briefing rules would be unwise, unnecessary, and contrary to the interests of the litigants who wait far too long for decisions from our Court. Further, it would be contrary to the interests of the public at large. As we pointed out over a year an a half ago, delay reduction is important for a number of reasons:

- Reduction of delay counters the public's perception that high costs and excessive delays hinder access to the courts, result in unfair advantages to certain litigants, and interfere with the equal distribution of justice.
- "From the injured person forced to wait years for compensation to the executive unable to finalize a business transaction, the impact of delay is acutely felt as bills mount, commercial and personal opportunities diminish and future plans are placed on hold. A child awaiting adoption, an accused awaiting trial, and a crime victim and her family experience all too concretely the anxiety produced by the prolonged uncertainty of the outcome of litigation."[1]
- Lengthy delays on appeal may decrease the chance that funds will be available to cover damage awards.
- The cost of business transactions goes up while the predictability of business decisions declines.
- Delay places additional strain on family relationships as marriage dissolution, custody and adoption decisions are reviewed and possibly revised.

[1] R. Novak and D. Somerlot, *Delay on appeal: a process for identifying causes and cures* (1990).

- If there is a remand, delay increases the potential that witnesses will not be available to testify and evidence will be lost.
- Delay leading to unresolved legal issues leaves the litigants, the lower courts, and the public without adequate guidance. (See, generally, Novak and Somerlot, *supra*).

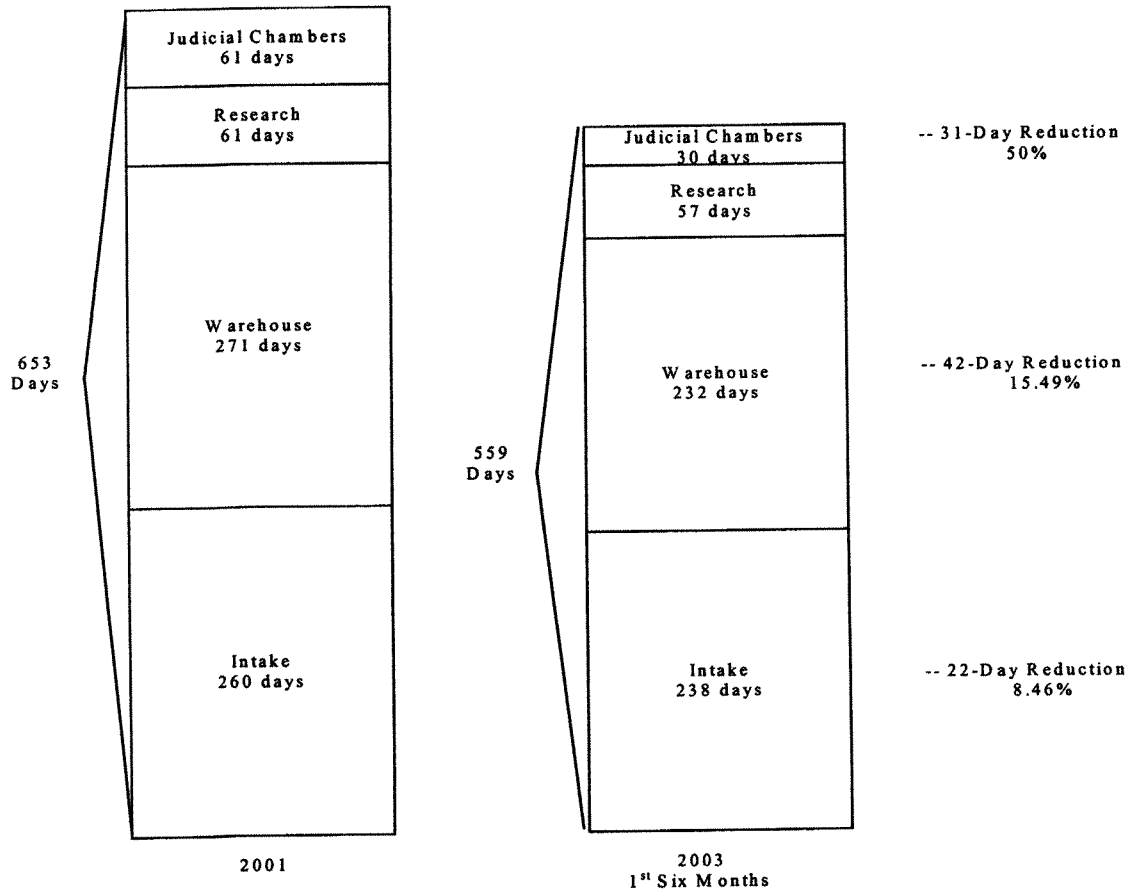
With these factors in mind, arguments for further delay, no matter how well intentioned or artfully phrased, should ultimately be unavailing.

The Arguments For Delay

A. Overview

As you know, in March of 2001, after months of concentrated study, the Court of Appeals embarked upon an ambitious delay reduction plan. At that time, our Court adopted a long-range goal of disposing of 95% of all cases filed with it within 18 months of filing, commencing with those cases filed on and after October 1, 2003. As Figure 1 shows, the results to date have been impressive. The Judges of the Court have cut the time that an opinion case spends in their Chambers in half. The Court has reduced the time an opinion case waits in the Warehouse by 42 days, without *any* increases in staff resources. Overall, the Court has reduced the time it takes to process an opinion case from the date of filing to the date of the release of the opinion by 94 days.

FIGURE 1
PROCESSING TIMES
2001 v 2003

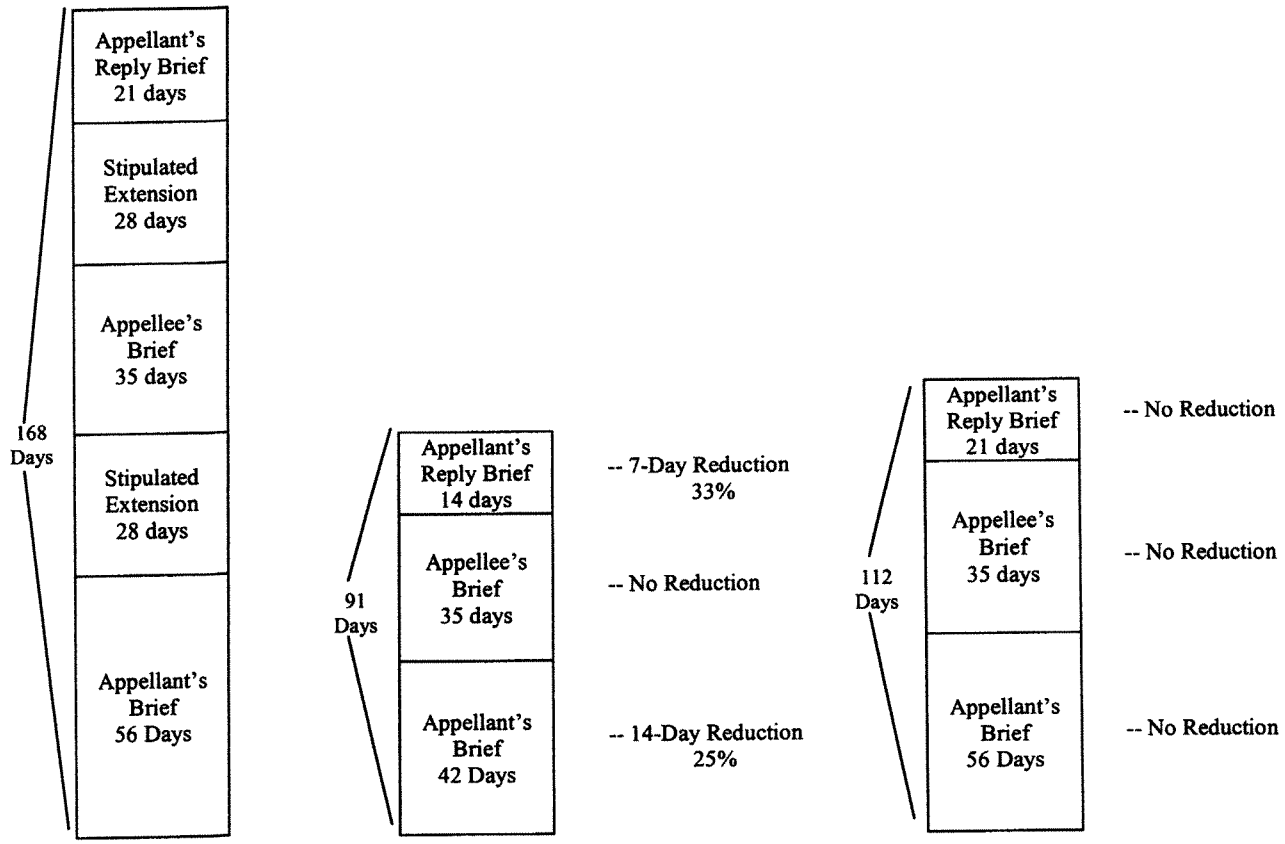


Fortunately, through the most helpful involvement of the State Bar of Michigan and its Appellate Practice Section, we were successful in obtaining the funds necessary to increase the capacity of our Research

Division. Over the next fiscal year, therefore, we will also be able to eliminate or substantially reduce the Warehouse.

The last obstacle to achievement of our long-term goal is the delay in the Intake phase of our cases. Well over a year and a half ago, we first began discussing changes to the court rules as a means of reducing this delay. We proposed to reduce the time a case spends in Intake to 173 days on average for those cases filed after October 1, 2003 by reducing briefing times and by eliminating stipulated extensions. Recently, we modified our proposal so that the reduced briefing times would apply to all civil, but not all criminal, proposals. Figure 2 shows the current situation and the proposed changes. Under the present court rules attorneys can, after the transcripts are filed and without considering extensions granted on motion, have as much as 168 days to complete the briefing process at the Court of Appeals. Our proposed court rule changes will reduce this time to 112 days for criminal cases and 91 days for civil cases.

FIGURE 2
RULE CHANGE PROPOSALS



[1] Does not include time for filing the record, including transcripts.
[2] Does not include extensions granted on motion.

Quite obviously, the centerpiece of our proposed court rule changes is to eliminate the stipulated extensions of time currently allowed in MCR 7.212(A)(1)(a)(iii) and 7.212(A)(2)(a)(ii). These provisions allow the parties, *without review or approval by the court*, to stipulate to an extension of 28 days in the time for filing the appellant's brief and a counterpart extension of 28 days in the time for filing the appellee's brief. Our

statistics show that, overall, these stipulations are used in approximately 52% of opinion cases. Therefore, eliminating them would save, on average, 22 days in the Intake phase. Further, this step would put the Court, and not the litigants, fully in charge of this critical phase in the appellate judicial process. No other court in Michigan except the Court of Appeals has a provision that allows the parties to stipulate to time extensions without judicial approval. Indeed, among the comparable state appellate courts that we have surveyed, only three – Arizona, California and Maryland – have anything approaching Michigan's automatic stipulated extensions system. See attachment. All of the other comparable states require action by the court itself. Removing this provision from the Michigan court rules is not only important to our delay reduction effort, it is essential to proper court administration and docket control.

I believe it fair to say there has been widespread recognition and almost universal support for our overall effort to reduce delay at the Court of Appeals. There has been, however, considerable comment and opposition from members of the State Bar of Michigan and from the State Bar itself to our proposed court rule changes. This opposition centers on four arguments to which I will respond below. These arguments are:

- The proposed court rule changes are misdirected in that they will simply cause a "hurry up" process in the Intake phase and a concomitant further "wait" in the Warehouse.
- The proposed court rule changes are unnecessary in that if the Warehouse is eliminated there will be no need to reduce the time in Intake.
- The proposed court rule changes are premature in that the efforts of the Record Production Work Group may result in significant reductions in the time it takes to file the lower court record and to obtain transcripts and with these reductions there will be no need to reduce the time in Intake.
- The proposed court rule changes will by reducing the time for briefing adversely affect the quality of the briefs the Court receives.

B. The Proposed Court Rule Changes Are Misdirected

Your letter to me does not directly make the "hurry up and wait" argument. However, this argument has been a common theme in the comments filed with the Michigan Supreme Court by various groups and individual practitioners. The basic thrust of this argument is that there is little utility in reducing the time in Intake if the Warehouse continues to exist. Attorney General Cox perhaps best expressed this viewpoint in the comments he filed with the Michigan Supreme Court on August 25, 2003:

> The problem of delay in overall disposition of Court of Appeals cases is almost entirely due to the fact that cases don't come out of the Warehouse to the research staff and judicial chambers fast enough. The proposed reductions in the time to file briefs simply do not address that problem and are therefore unlikely to reduce the overall delay. Putting cases *into* the Warehouse faster simply means there would be more cases in the Warehouse awaiting assignment to research attorneys and judges; it wouldn't mean quicker opinions unless cases also get *out* of the Warehouse faster. Reducing briefing times might shorten the time period called Intake, but it would just mean that cases languish longer in the Warehouse. [Emphasis in the original].

In response, I first note that the Court of Appeals, essentially by funneling cases directly to the Judicial Chambers, has made considerable progress in reducing the time cases gather dust in the Warehouse. In 2001, an opinion case spent 271 days in the Warehouse; in the first six months of 2003, we had reduced this time to 232 days, a 42-day reduction. We achieved this reduction without a single penny of additional resources; indeed, the Court experienced several budget reductions during this period.

We have, moreover, acknowledged from the outset that reducing the time in Intake would be singularly ineffective in reducing overall processing time if we are not also able to eliminate or significantly reduce the Warehouse. The cork in the bottle in this area was the capacity (not the productivity) of the staff in the Court's Research Division. Previous staffing levels in the Research Division meant that it could not, by itself, appreciably reduce the wait in the Warehouse, the very existence of which derived from the fact that the Research Division was inadequately staffed.

As you know, in our presentation of our budget request for FY 2004, we emphasized that we must add attorneys to our Research Division in order to eliminate or drastically reduce the Warehouse. Fortunately, there was almost universal recognition of this urgent need. As part of an overall package of fee increase bills originated by the Supreme Court, supported by the Executive Branch, enacted by the Legislature, and signed by the Governor, we will receive approximately $525,000 more in revenues in FY 2004 from entry and motion fees than we received in FY 2003. *These funds will allow us to increase our Research Division staff and eliminate or drastically reduce the Warehouse.*

Thus, I believe the "hurry up and wait" argument falls of its own weight. The premise of this argument is that the Warehouse, as we now know it, will continue to exist. It will not. The proposed changes in the court rules to reduce the time in Intake are therefore not misdirected. They are aimed precisely at the final obstacle to reaching our delay reduction goals.

C. The Proposed Court Rule Changes Are Unnecessary

In your letter, interestingly, you make something of the converse of the "hurry up and wait" argument. You note that for 2002, warehouse delay affected 34.6% of all cases and 80% of opinion cases. You then state, "if the warehouse were eliminated, cases disposed of within 290 days would increase dramatically."

We too reached this conclusion early on in formulating our delay reduction plan. I believe that our success in obtaining additional funding for the Research Division derives largely from the fact that we were able to outline the reasons for, and the solutions to, the delays that the Warehouse causes. *It does not follow, however, that eliminating or substantially reducing the Warehouse will eliminate the need to reduce delay in Intake.* If we eliminate the Warehouse,[2] our calculations—which have been publicly available for over a year and a half—show that we still must reduce the time an opinion case spends in Intake by approximately 87 days from the 2001 level of 260 days. To date, the time in Intake has dropped by 22 days. *Therefore, we still need to reduce the time in Intake by approximately 65 days and we believe that our proposed court rule changes will accomplish this reduction.*

In your letter, you also make some observations about "outlier cases." As I understand this term, it refers to "problem" cases in which there have been excessive delays. Addressing these "outlier cases," you state that, "Given the Court's goal of disposing of 95% of all cases within 18 months, only 6.1% of the cases remain to be addressed in some way to reduce delay."

Statistically, you are correct that eliminating outlier cases would certainly reduce the average processing time for opinion cases. It is also true that while we can easily identify such outlier cases retroactively, *it is difficult if not impossible to identify them prospectively.* As you know, we worked long and hard with representatives of the State Bar to reach some type of consensus as to mechanics of a differentiated case management system. That proved to be impossible, at least within the time constraints under which we were

[2] I note that it will never be possible to completely eliminate the Warehouse; there will always be some time, however minimal, required to move cases from the Clerk's Office at the conclusion of the Intake phase to either the Research Division or the Judicial Chambers directly. Further, although we received additional funding for FY 2004, this funding will not be sufficient for us to hire and maintain the full complement of Research Division staff necessary to completely eliminate the Warehouse.

operating, and your letter to me implicitly concedes the inherent difficulties in identifying potential outlier cases based on Intake characteristics. While we have some ideas about approaches we might test in the future and look forward to discussing these approaches with you, this does not eliminate or even reduce the pressing need to act now to reduce the delays in Intake. The proposed changes in the court rules to reduce the time in Intake are therefore absolutely necessary. We cannot meet our delay reduction goals without these changes.

D. The Proposed Court Rule Changes Are Premature

I think that you would agree that the central contention in your letter is that our proposed changes in the court rules are premature. You state that:

> [O]ur review suggests that current efforts to increase Court staff and eliminate the warehouse *coupled with ongoing efforts to examine and address transcript and record production delay* will allow the Court to meet its goal without compromising quality or imposing hardships on either the bench or bar by adopting unrealistic deadlines. [Emphasis supplied].

The ongoing efforts to which you refer are the efforts of the Record Production Work Group that Chief Justice Corrigan and I recently appointed. We are indeed hopeful that these efforts will result in significant efficiencies and that we can reduce the time it takes to produce the lower court record, with particular attention to transcript production. As you and I have discussed, this is a complex undertaking. Almost certainly, any approach that the Work Group recommends will involve both changes to the court rules and changes to the governing statutes. Of necessity, this will not be a process that will produce immediately realizable timesavings. In my view, we cannot put our delay reduction plan on indefinite hold while we work our way through this process.

I have also encountered a variant of the argument that the proposed court rule changes are premature. This argument concentrates on timing. Why, it is asked, make changes in the court rules until the Warehouse is eliminated? This argument ignores the schedule by which we are proceeding. We have asked that the court rule changes become effective January 1, 2004. For most of the appeals filed after that time, at least three months will elapse for record and transcript production. Therefore, the changes in the court rules will affect briefs for which the clock begins running on and after April 1, 2004.[3] By that time, we will be six months into FY 2004 and our additional staff in the Research Division will have substantially reduced the wait in the Warehouse.

In summary, there is no silver bullet that exists now or that could conceivably exist in the near future that will eliminate the need to address the problem of delay in Intake. It makes little sense to continue to avoid facing that simple fact. The proposed changes in the court rules to reduce the time in Intake are therefore not premature. It is now time, I again respectfully suggest, for the lawyers who practice before our Court to recognize and take responsibility for the effect that delay in Intake has on the litigants who are, after all, their clients.

E. The Proposed Rule Changes Will Adversely Affect The Quality Of Briefing

The final argument, again alluded to in your letter, is that the proposed rule changes will adversely affect the quality of briefing. I realize that many practitioners sincerely hold this belief. I also recognize that lawyers, being human, can be expected to react negatively to proposals for change, particularly when those proposals have an impact upon systems to which they have grown accustomed. I suggest that such a situation exists here. As Figure 2 shows, under the current court rules the attorneys can, after the transcripts are filed and without

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[3] See MCR 7.212(A)(1)(a): the appellant's brief is due "56 days after the claim of appeal is filed, the order granting leave is certified, *or the transcript is filed with the lower court or tribunal.*" [Emphasis supplied.]

considering extensions granted on motion, have as much as 168 days to complete the briefing process at the Court of Appeals. Our proposed changes will reduce this time to 112 days for criminal cases and 91 days for civil cases.

I submit again that, after transcripts are filed and without considering extensions following motions, a system that grants *three and one half months to brief a criminal case and three months to brief a civil case* does not impose a hardship on appellate attorneys nor will it reduce the quality of the briefs that are filed. Indeed, the attachment shows that lawyers in many comparable states operate under time standards more rigorous than those we propose.

To be sure, our proposed changes will require appellate attorneys to work both harder and smarter. They will require these attorneys to choose their issues wisely and to allocate their time carefully. These attorneys will not be able simply to allow their work to expand to meet the time available. The proposed rule changes will, however, not adversely affect the quality of briefing. There is no inherent tradeoff between quality and timeliness, and the proposed court rule changes do not contemplate nor will they result in such a tradeoff.

In conclusion, let me again thank you and the other members of the State Bar who have worked long and hard on this subject. I regret that we were unable to agree upon a consensus proposal to make to the Michigan Supreme Court and I know that in the future we will again be on the same side with respect to important issues affecting the judiciary. On the subject of the final step in our delay reduction plan, however, I firmly believe that the State Bar has chosen the wrong side and I hope and expect that the Michigan Supreme Court will agree.

Sincerely,

William C. Whitbeck
Chief Judge, Michigan Court of Appeals

cc: Justices of the Michigan Supreme Court
Court of Appeals Judges
Mr. Corbin Davis/Ms. Linda Mohney Rhodus

SISTER STATE APPELLATE COURTS
Briefing Times And Extensions
(Civil, non-priority appeals)

State Court Rule Cite	Appellant's brief*	Appellee's brief	Reply Brief	Extensions	Comments
Arizona Rule 15	40 days	40 days	20 days	The time for briefing, among other things, may be shortened or extended by the court upon stipulation or upon motion, for good cause shown. [Rule 5.]	
California Rule 15	70 days (if proceeding w/ appendices and w/o a reporter's transcript) 30 days (if proceeding w/ a reporter's transcript)	30 days	20 days	Each party may receive a 60-day extension by stipulation. Additional time may be obtained by motion upon a showing of good cause.	
Florida Rules 9.110(f), 9.210(f)	70 days (from the filing of the notice of appeal; briefing time is extended if the time for filing of the record is extended.)	20 days	20 days	By motion only. Motion must contain a certificate indicating that non-movant does not object to the extension or will immediately file an objection. [Rule 9.300(a).]	
Illinois Rule 343	35 days	35 days	14 days	Extensions may be granted by the court sua sponte or upon motion of a party supported by an affidavit showing good cause.	The Committee Comments state: "The committee recommends 35 days as the time period for the main briefs best calculated to fit the requirements of the bar and the reviewing courts. The committee recognized the importance of providing a long enough period to permit the preparation of a brief in the ordinary case without the necessity of an extension of time and a short enough period to permit prompt disposition of the business of the reviewing courts. Five weeks would seem to be a realistic compromise."
Indiana Rule 45	30 days	30 days	15 days	May be granted by motion of a party that provides the reason, in spite of the exercise of due diligence shown, for requesting the extension. [Rule 35.]	Motions in certain priority cases (e.g., worker's comp, child custody, support, visitation, paternity, adoption, termination of parental rights) shall be granted only in extraordinary circumstances.
Maryland Rule 8-502	40 days	30 days	20 days (but no later than 10 days before oral argument)	Allowed by stipulation of parties if filed at least 30 days before oral argument.	

Massachusetts Rule 19	40 days	30 days	14 days	By motion for good cause shown. [Rule 14(b).]	
Minnesota Rule 131.01	30 days	30 days	10 days	By motion for good cause shown. [Rule 131.02.]	The time for filing the appellant's brief was shortened in 1983 from 60 days to 30 days. [Comment to Rule 131.01.]
New Jersey Rule 2:6-11	45 days	30 days	10 days	Extensions may not be obtained by consent of the parties. Extensions may be granted only by order for good cause shown unless otherwise provided by rules. [Rule 2:9-2.]	
North Carolina Rule 13(a)	30 days	30 days	14days	By motion for good cause shown. [Rule 27(c).]	
Ohio Rule 18	20 days	20 days	10 days	By motion for good cause shown. [Rule 14.]	
Pennsylvania Rule 2185	40 days	30 days	14 days	By application for good cause shown. [Rule 105.]	
Wisconsin Rule 809.19	40 days	30 days	15 days	Unknown	

*The time period for filing the appellant's brief begins from the date the last transcript or a settled statement of the case is received except as otherwise noted.